NEW ZEALAND LAW SOCIETY
NZLS EST 1869

Law Society Building, 26 Waring Taylor Street, Wellington
DX SP20202, Wellington
PO Box 5041, Wellington 6140, New Zealand

TEL +64 4 472 7837 · FAX +64 4 473 7909
E inquiries@lawsociety.org.nz · www.lawsociety.org.nz

1 April 2019

DNA review
Law Commission
Wellington

By email: dna@lawcom.govt.nz

Re: The Use of DNA in Criminal Investigations, Issues Paper 43

INTRODUCTION

1. The New Zealand Law Society welcomes the opportunity to comment on the Law Commission's review of the Criminal Investigations (Bodily Samples) Act 1995 (CIBS Act) in its Issues Paper, *The Use of DNA in Criminal Investigations/Te Whakamahi i te ra Tangata i ngā Mātai Taihara – Issues Paper 43*, December 2018 (Issues Paper).

2. The Law Society agrees with the Commission's central proposition that a new Act is needed to replace the CIBS Act.[1] We have also prepared an appendix summarising those aspects of the regulatory regime for DNA use in criminal investigations that we think should involve an independent oversight body, judicial approval, or both. This can be found at Appendix A.

3. The Law Society's responses to the Issues Paper questions are set out below. The Law Society has drawn on the expertise of highly experienced practitioners on its Criminal Law, Human Rights and Privacy, and Public and Administrative Law Committees, and records its gratitude for the extensive input and assistance it has received from the committees in preparing this submission.

4. If the Commission would like to discuss any aspect of the submission, we would be very pleased to arrange a meeting with Law Society representatives.

CHAPTER 2 – FRAMEWORK FOR ANALYSIS

Q1. *One of our goals is to ensure that legislation regulating the use of DNA in criminal investigations is fit for purpose. It must have a clear purpose that has been robustly tested, be certain and flexible for the future and be appropriately comprehensive and effective for that purpose within the context of the wider criminal justice system. What do you think about the way we have framed this goal?*

5. As noted above at [2], the Law Society agrees with the Commission that the use of DNA in criminal investigations has outstripped the statutory scheme, with the result that the current system does not provide consistent or thorough safeguards.[2] Practices in this area are therefore currently driven by law enforcement objectives and opportunities rather than public, broadly informed and balanced debate.

---

1 Issues Paper at [5], [12].
2 Chapter 2, particularly [2.22] and [2.33] to [2.41].

6. In this context, we agree that the goal expressed above is appropriate, but note that it encompasses potentially conflicting elements:

   A. the "clear and appropriately comprehensive purpose": i.e. how to prescribe the scope of permissible DNA collection, retention and use;

   B. the "robustly tested" purpose: i.e. how to ensure that the prescribed scope is justifiable considering the objective degree of benefit for law enforcement purposes, the corresponding intrusion into personal privacy, and any other consequences;

   C. the "effective purpose": i.e. how to ensure compliance with the prescribed scope; and

   D. the "future flexibility purpose": i.e. how to accommodate continuing innovation and other changes in circumstance.

7. Objectives B and C tend towards a prescriptive and exclusive regulatory regime, while objectives A and D tend against prescription. It is important to find a solution that reflects New Zealand needs, while achieving the right balance between the different objectives.

Q2. *One of our goals is to ensure that the use of DNA in criminal investigations is regulated in a way that is constitutionally sound. This requires ensuring that the regime is consistent with the principles of the Treaty of Waitangi and NZBORA and that any intrusions upon tikanga and privacy are minimised. What do you think about the way we have framed this goal?*

8. This goal is commendable and is broad enough to encompass a range of different outcomes. For reform in this area to be constitutionally sound, it is necessary to ensure that the costs and benefits of investigatory techniques are adequately considered in a publicly accountable way as they apply to both individual and potentially competing public interests. This includes considering:

   a. whether investigatory techniques are effective, and if so, in what respects. This requires a regular and objective review of scientific developments;

   b. the extent to which techniques intrude into individual privacy or impinge upon tikanga Māori;

   c. whether techniques have any adverse side effects or consequences, such as distorting investigative procedures or giving rise to bias; and

   d. how individual investigations and new procedures or techniques are to be governed, what information decision makers need to have, and how far new techniques can be permitted without recourse to Parliament.

9. The examination in the Issues Paper[3] of how DNA investigative techniques are used in similar legal jurisdictions is particularly informative.

---

[3] For example the discussion of *S and Marper v UK* at Issues Paper footnote 113, and the international case law on covert indirect sampling at [9.10] to [9.19] and [9.109] to [9.113].

Q3. *One of our goals is to ensure that legislation governing the use of DNA in criminal investigations is accessible. It should be conceived of and expressed simply. What do you think about the way we have framed this goal?*

10. The Law Society considers that legislative clarity is a more important objective when dealing with intrusive public powers, than simplicity. The subject area is inherently complex and there is a risk that simplifying the legislation would mean glossing over or losing important details. Making the legislation clearer would still allow many of the current problems with inconsistent terminology, illogical structuring and omissions to be rectified without losing an essential level of detail. The goal could be reframed to the effect that the legislation should be expressed as simply as practicable given the subject matter.

CHAPTER 4 – TIME FOR A NEW ACT

Q4. *Do you think that the CIBS Act should be repealed and replaced with a new Act? Why or why not?*

11. We agree with the Commission that the CIBS Act should be repealed and replaced with a new Act, for the reasons set out in the Issues Paper.[4] The Commission has identified seven fundamental problems with the current Act, with which the Law Society agrees:

- The purpose of the Act is not clear
- The internal structure of the Act is confusing
- The forms, terminology and retention periods in the Act are overly complex
- The privacy concerns have significantly changed
- The science has advanced
- The Act is not sufficiently comprehensive
- There is no independent oversight body

CHAPTER 6 – FORENSIC DNA PHENOTYPING

Q5. *What concerns do you have, if any, about the use of forensic DNA phenotyping in criminal investigations?*

12. We agree that the Issues Paper[5] appropriately identifies the legal and ethical issues in this context as matters that significantly affect fundamental human rights. It is therefore agreed that these matters should be addressed in primary legislation.

Q6. *How do you think forensic DNA phenotyping should be regulated in New Zealand?*

13. We agree with the Commission's suggested approach of developing a permissive but conservative statutory regime.[6] We think that phenotyping should be reserved for use in investigations into serious offending where there is a case-specific need for its use. This would be proportionate, necessary and minimally intrusive and therefore compliant with the

---

4 [4.42] to [4.62].

5 [6.23] to [6.52].

6 Summarised at [6.83].

New Zealand Bill of Rights Act (NZBORA)[7] and the Privacy Act.[8] Limiting use to a small number of cases would minimise the risk of damage to social cohesion which might result from identifying an offender's ethnic or racial group.

14. If an independent oversight body is established, it would be appropriate for one of its functions to be market approval of new forensic DNA phenotyping kits. This would include verifying the scientific validity of such kits prior to sale and granting approval for use, subject to the types of analysis that are deemed socially acceptable.

CHAPTER 7 – FORENSIC COMPARISONS

Q7. *What concerns do you have, if any, about the introduction of new DNA analysis techniques into casework in New Zealand?*

15. The Law Society considers that there is a real concern about the funding required for the courts and counsel to understand emerging techniques and address them through the usual filters by which admissibility of evidence, derived from novel scientific techniques, is considered.

Q8. *What factors do you think should be considered before a new DNA analysis technique is introduced into casework? Who do you think should make that decision?*

16. If an independent oversight body is established, one of its functions should be to grant approval before any new techniques are used in the criminal evidential process, subject to assessment against the *Daubert* factors.[9]

Q9. *Do you think that the role of Police "forensic service provider" should be recognised in statute? If so, how do you think that role should be structured?*

17. The role of forensic service provider is not mentioned in the CIBS Act, even though the current provider, ESR, plays an important role in the processing of DNA evidence in criminal investigations and prosecutions.

18. In light of this central role, and the stated goals of this review to improve efficacy, transparency and accountability, it is necessary to refer to the forensic services provider function in statute. In the interests of future flexibility, it is not necessary for any statute to specify either the name of the provider, or that the service must necessarily be carried out solely by ESR, or any other specific named public or private entity.

19. It follows that if a statutory forensic services provider will continue to be the primary provider of forensic DNA evidence in criminal prosecutions, and if it is to be relied upon equally by both sides of the adversarial process, its independence from Police should be

---

7 [6.23] to [6.48].

8 [6.49] to [6.52].

9 The *Daubert* factors were promulgated by the US Supreme Court in *Daubert v Merrel Dow Pharmaceuticals Inc.* 509 US 579 (1993). The factors are a standard starting point used by trial judges to assess whether an expert witness's scientific testimony is based on scientifically valid reasoning that can properly be applied to the facts at issue. They are: (1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community.

acknowledged in statute. This would help to protect the Police and the forensic services provider against potential allegations of collusion or bad faith.

20. It would be appropriate for a forensic services provider either to be represented on, or have responsibility for providing expert guidance to, the proposed independent oversight body.

Q10. *What concerns do you have, if any, about the increased use of highly sensitive DNA analysis techniques (that enable trace DNA to be analysed) in criminal investigations?*

21. It would be unduly restrictive to limit the range of permissible techniques to primary legislation because the frequency of use and the sensitivity of DNA techniques is increasing. It would be more appropriate for legislation to stipulate the process by which decisions are made about the legality of available techniques, and for those decisions to be taken by an independent oversight body.

22. If a Criminal Cases Review Commission is established in New Zealand,[10] a proposal that is supported by the Law Society,[11] that would add an additional safeguard in circumstances where scientific developments can produce exculpatory evidence.

Q11. *What limits, if any, do you think there should be on the type and/or amount of information that may be included in a DNA profile that is generated from a crime scene sample and a reference sample for direct forensic comparison purposes?*

23. This is a significant policy issue and the Law Society does not have the necessary expertise to comment on it. However, it is essential that any policy decisions are made subject to the principles of proportionality, necessity and the minimal level of intrusiveness that is demonstrably justified in a free and democratic society.

24. In light of the potential for developments in DNA technology being used in ways that risk significant infringement of the principles protected by NZBORA, it is important to reiterate the framework for assessing the proportionality of rights-infringing measures, which is summarised in *R v Hansen:*[12]

    a) *Does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?*

    b) *If so, then:*

        i) *Is the limit rationally connected with the objective?*

        ii) *does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?*

        iii) *is the limit in due proportion to the importance of the objective?*

---

10 A Bill to establish a Criminal Cases Review Commission as a new mechanism for criminal case review was introduced in September 2018 and is currently at select committee stage: https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_80426/criminal-cases-review-commission-bill.

11 NZLS submission 24.1.19, available at http://www.lawsociety.org.nz/__data/assets/pdf_file/0014/130604/Criminal-Cases-Review-Commission-Bill-24-1-19.pdf.

12 [2007] NZSC 7 at [123]

CHAPTER 8 – REFERENCE SAMPLES – DIRECT COLLECTION

Q12. *What methods for obtaining a suspect or elimination sample directly from a person should be available in new legislation (that is, venous, fingerprick, buccal (mouth) swab, tape and/or fingerprint) and why?*

25. The choice of method is an important question. The Law Society agrees with the Attorney-General that the taking of DNA samples is "properly regarded as an invasive search of the person."[13] For that reason, the least invasive method should be prescribed where different methods are available.

26. We note that the Issues Paper identifies that a buccal sample is currently the least physically intrusive method of biological sampling that is available, with the greatest chance of obtaining a viable sample.[14] However, it is necessary to address this question by reference to current techniques and potential future developments. New techniques may be developed, and existing techniques may be improved or fall out of favour. For example, an overseas study suggests that skin surface taping may be an "extremely useful" source of DNA samples where buccal swabs are unavailable.[15]

27. As such, it may be counterproductive to expressly prescribe particular methods of DNA sampling in primary legislation. Rather, any new legislation should require that:

    a. if a person nominates a method of DNA sampling (and that method is likely to produce a viable sample), that method should be used; but

    b. if no method is nominated, the least intrusive method that will produce a viable sample should be used, taking into account matters such as the available technology, the person's bodily integrity, the person's privacy rights and tikanga Māori.

28. The Commission questions whether fingerprick and venous sampling should be included in new legislation.[16] It seems sensible to retain fingerprick sampling for marginal cases. For example, if any new legislation permits taking a sample by reasonable force, a fingerprick sample is likely to be more reliable than other forms of sampling and easier to obtain than a buccal sample (which likely requires some degree of compliance on the part of the donor).

29. We do not see any advantage in retaining the use of venous samples. A fingerprick sample is likely to be just as reliable and less intrusive. New legislation should therefore exclude venous samples from use, although if the principles above are adopted, that method is unlikely to be used in any event.

Q13. *Do you think that, if a person refuses to comply with a suspect or juvenile compulsion order, a police officer should be able to use reasonable force to obtain the sample? If so, what legislative safeguards do you think should be in place? If not, what should happen if the person refuses to comply with the order?*

30. The use of reasonable force to obtain a DNA sample involves an invasion of a person's bodily autonomy. However, the law permits this for other law enforcement purposes, such as

---

13 *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Criminal Investigations (Bodily Samples) Amendment Bill*, 2009 at [2.2].

14 [8.45] to [8.52]

15 Mohammed H. Albujja et al "Evaluation of Skin Surface as an Alternative Source of Reference DNA Samples: A Pilot Study" (2018) 63 Journal of Forensic Sciences 227.

16 [8.52].

making an arrest or conducting a search of the person, provided that the force used is reasonable and proportionate to the purpose. It is acknowledged that the collection of a DNA sample may be considered a more serious matter given the informational significance of DNA and the duration for which it can be stored and used. However, the Law Society considers that use of reasonable force to obtain a court-ordered sample is a potentially justifiable engagement of a person's rights:

a. The fact that the sampling has been ordered by a court provides a significant procedural safeguard and independent oversight and is crucial to the reasonableness of the search. Under section 16 of the CIBS Act, the court must be satisfied of various matters before ordering that a bodily sample is to be taken, and it retains a discretion not to do so; and

b. New Zealand is not alone in permitting the use of reasonable force to obtain DNA samples following the granting of a court order. For example, section 47 of the New South Wales' Crimes (Forensic Procedures) Act 2000 permits the use of reasonable force to carry out a "forensic procedure". Some regimes go further, authorising the use of reasonable force without a court order.[17] The Law Society does not endorse the latter approach.[18]

31. If the practice of using reasonable force to obtain a court-ordered sample is to continue, the Law Society agrees that the restrictions in Part 2 of the CIBS Act, and in particular section 16, should be maintained. The prospect that reasonable force will be used to execute a compulsion order underscores the importance of a robust decision-making process surrounding the making of compulsion orders. Legislation prescribing the factors a court must consider preserves judicial discretion to decline to make an order, and granting rights of appeal affords greater protection of suspects' rights.

32. Currently, a suspect compulsion order, and therefore the use of reasonable force, can be ordered in respect of any offence punishable by imprisonment or listed in Part 3 of the Schedule to the CIBS Act. The Commission may wish to consider whether the legislative safeguards in place could be strengthened by only permitting the use of reasonable force to obtain court-ordered samples in respect of alleged offences of a certain level of seriousness. Forcibly taking a sample from a person suspected of minor offending may be disproportionate. A seriousness threshold would be consistent with the tenor of the European Court of Human Rights (ECHR) jurisprudence, especially *Aycaguer v France* [2017] ECHR 587 and *S and Marper v United Kingdom* [2008] UCHR 1581. In these cases, the ECHR made the seriousness of the suspected offending a key consideration in its assessments about whether steps to obtain and retain DNA samples were proportionate and justifiable from a rights perspective. The ECHR decisions also emphasise the importance of specific and

---

17 Sections 24 and 36 of the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland) permits use of reasonable force to take a sample, but not from children. That regime prescribes who can use reasonable force and what they must advise the person of prior to using such force.

18 This view was shared by the Attorney-General when amendment to the Act was proposed in 2009 to permit the use of reasonable force without a court order to obtain a DNA sample: Hon. Christopher Finlayson, *The Report of the Attorney General under the New Zealand Bill of Rights Act 1990 on the Criminal Investigations (Bodily Samples) Amendment Bill* (House of Representatives, Wellington, 2009).

detailed rules in this area, as opposed to permissions or powers that are generic or indiscriminate in their application.

33. The Law Society has the following concerns about the options outlined in the Issues Paper[19] if a suspect refuses to comply with a compulsion order:

    a. There are likely to be practical implications associated with collecting a sample by indirect means. For example, a sample collected from a suspect's drink bottle or hairbrush is more likely to be contaminated than a direct sample and will therefore be of lower quality. Moreover, indirect samples taken from shared spaces may be not be attributable to the correct owner.

    b. We do not think it is appropriate for an adverse inference to be drawn from a refusal to allow a DNA sample to be taken (as is currently permitted by section 70 of the Act). It is difficult to reconcile section 70 with the protection afforded to an equivalent right, such as the right to silence under section 32 of the Evidence Act 2006. Section 32 prohibits a fact-finder from drawing an adverse inference from a defendant's refusal to answer police questions during an investigation. The Law Society sees no reason why the refusal to provide a sample should be treated any differently, particularly when there are reasons other than guilt, why an individual may withhold consent to a sample being taken. Objection on religious grounds is an obvious example.

Q14. *What concerns, if any, do you have about police officers obtaining suspect samples from adults, young persons (aged 14 to 16)[20] and prosecutable children (aged 10 to 13) by consent? How do you think those concerns could be best addressed in new legislation?*

34. The Law Society recognises the advantages that a consent process has for efficient policing. However, the primary concern with a consent process is the risk of abuse or coercion, or uninformed consent being provided. It is therefore paramount that consent is properly informed.

35. Informed consent requires that relevant information be disclosed to the subject, and the circumstances in which the decision is made should be free from coercion. The subject must be made aware of their right to refuse to provide a sample, and the full scope of police powers to obtain a sample if they do refuse. Currently, a police constable must provide a subject with information that is prescribed in section 30 of the CIBS Act[21] in order to properly obtain their consent. We recommend that any revised or replacement legislation continues to prescribe the information that must be provided, rather than relying solely on the development of internal Police guidelines.

36. In particular, a subject should be told that Police have the ability to seek a court order compelling the person to give a sample if consent is refused, and they should be told this before making a decision whether to consent. This is not currently provided for by section 30 even though it is information that is relevant to the decision.

37. The Law Society acknowledges the risk that people may feel they have no choice but to consent to a sample if they are told the court can ultimately compel it. However, we consider that this risk can be adequately managed by clear language specifying that Police

---

19 See Chapter 9 re: indirect sampling, and [8.56] re: inferences.

20 Due to change to 17 years on 1 July 2019.

21 http://www.legislation.govt.nz/act/public/1995/0055/81.0/DLM369262.html

may apply for a compulsion order and that the court *may* grant a compulsion order. Police must not express an opinion on whether the application for a compulsion order will be successful, in order to encourage consent to be given.

38. The Law Society supports the proposed measure of preparing a plain English version of the sampling notice and the accompanying oral information (also to be provided in te reo Māori and other languages).[22] Such a notice should be included in a schedule to the revised legislation itself, reflecting the recognised need for "clear, detailed" rules when dealing with the collection of DNA samples in order to safeguard against the risk of abuse and arbitrariness.[23]

39. We acknowledge the additional proposed measure of preparing a simplified form for persons with intellectual or learning disabilities. However, the Commission may wish to consider whether that will provide adequate protection for those persons, or whether a more robust process is required whereby a person showing signs of an inability to comprehend the relevant information is referred to a medical practitioner for assessment as to whether they have capacity to consent.[24]

40. As to consent of young persons and children, the CIBS Act currently differentiates between these groups: children under 14 years of age cannot consent, but those 14 years and older (young persons) can so long as their parents also consent. The Law Society strongly supports the strengthening of special protections for young people in this context. Serious consideration should be given to the option of removing the ability to obtain a sample by consent for young persons, so that samples are only obtained from this group pursuant to a court order. There may be little difference in the cognitive and comprehension abilities of a 13 year old (a child) and a 14 year old (a young person), and they may be from vulnerable families where the power imbalance between their parents and the police is more pronounced. The Commission may be assisted in considering the approach under the New South Wales regime, which only permits a sample to be taken from a child (defined as a person "who is at least 10 years of age but under 18 years of age") by way of court order.[25]

41. As a minimum, there should be a special sampling notice for young persons framed in age-appropriate language. The Law Society supports the introduction of a requirement that the young person's parent or guardian must also be given a copy of the sampling notice so that any consent given by the parent or guardian on the young person's behalf is properly informed.

Q15. *Do you think that a statutory framework should be put in place governing the collection of elimination samples (that is, samples from victims, third parties and investigators)? If so, what do you think the key features should be?*

42. The Law Society considers a statutory framework should govern the collection and use of all DNA samples. That framework should include the collection and use of elimination samples, particularly given:

    a. the strong privacy interests inherent in DNA sampling;

---

22 [8.91].

23 *S and Marper v United Kingdom* (Apps 30562/04 & 30566/04, 4 December 2008), at [99].

24 See for example the approach under the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 10 (concerning "protected persons" as defined in s 2).

25 Crimes (Forensic Procedures) Act 2000 No 59 (NSW), ss 3 ("child"), 7 and 23.

b. the serious consequences that may flow when an elimination sample unexpectedly incriminates the person (as in *R v Taufa*);[26] and

c. the need for transparency and legal certainty.

43. Any revised legislation should not refer to "elimination" samples. People who give elimination samples may reasonably expect the sample could only be used for one purpose: to *eliminate* them from consideration. The term "volunteer" sample may be more apt.

44. For practical purposes, investigators' elimination samples should be treated differently from witnesses' and victims' elimination samples. It would be administratively cumbersome and resource intensive to collect and then monitor retention and deletion of investigators' elimination samples and profiles on a case by case basis, particularly when investigators are likely to be working on multiple cases at any one time. By comparison, it would be more practical to collect, retain and delete victim and witness elimination samples on a case by case basis.

45. In respect of victims and witnesses, the circumstances of *R v Taufa* raise complex issues around the unintended[27] use of elimination samples. The options raised at [8.116] of the Issues Paper require further consideration, but options (a) and (b) likely provide the best protections for persons from whom an elimination sample is sought. That is: an elimination sample may only be sought in specific circumstances; no detriment follows from the decision not to provide an elimination sample;[28] and a match between an elimination sample and crime scene sample may not be used to support an application for a suspect compulsion order or juvenile compulsion order.

46. The considerations at [8.115] of the Issues Paper seem appropriate and should be enshrined in legislation where practicable. Further, a person giving an elimination sample should be provided with:

a. assurance that they are not a suspect, but a caution that the sample may be used against them if it implicates them as a suspect (if that remains permissible under new legislation);

b. an opportunity to obtain legal advice prior to giving an elimination sample; and

c. an opportunity to withdraw consent at any stage after giving an elimination sample.

47. For investigators however, a refusal to provide an elimination sample is likely to undermine the efficacy of professional crime scene investigation. It follows that there is a significant justification for investigators' elimination samples being collected at the outset of their operational career, and the profiles derived from those samples retained until retirement or the conclusion of any case in which they were operationally involved, whichever is the later.

48. In terms of retention practicalities, it would be appropriate to store profiles derived from investigators' elimination samples on a separate index of the databank from profiles derived from victims' and witnesses' elimination samples, and both sets should be on separate indices from the known persons databank. Victims' and witnesses' elimination samples

---

26 *R v Taufa* [2016] NZCA 639, discussed in the Issues Paper at [8.102] to [8.108].

27 In that an eventual use of the sample is unintended at the time of collection.

28 There may be many reasons why a person cannot give a sample (including religious, cultural or medical reasons). Nor should the law or Police practice incentivise a person to 'prove their innocence' through the provision of an elimination sample.

should be subject to deletion at the end of a fixed retention period on a case by case basis, subject to the conclusion date of the case.

Q16. *How do you think mass screenings should be regulated in New Zealand?*

49. As the Issues Paper notes,[29] mass screenings do not neatly fall within the category of elimination or suspect sampling. Such screenings involve an intrusive search of many people for (at best) speculative gain. It is unlikely that the general population would consent to their DNA profiles being retained by the State for indefinite use and subject to ever-increasing advances in analysis, in the event that mass screening was undertaken. As with elimination samples, a person consenting to a mass screening might reasonably assume that their sample is given only to eliminate them from a current investigation and within a short timeframe.

50. Accordingly, the use of mass screenings should be tightly prescribed and subject to similar restrictions as those for elimination samples, namely: legislative safeguards and assurances around the collection, time-limited retention and specific use of samples; confirmation that the person has had an opportunity to obtain legal advice; a prohibition against using any mass screening power where a subject may be a suspect; the opportunity to withdraw consent at any time; and a prohibition on drawing an adverse inference (or suffering any other detriment) as a result of a refusal to submit to a mass screening.

51. There should be no power to compel a person to submit to a mass screening, for the reasons set out in the Issues Paper.[30]

CHAPTER 9 – REFERENCE SAMPLES – INDIRECT COLLECTION

Q17. *Instead of obtaining a reference sample directly from a suspect, do you think that a police officer should be able to seize a personal item belonging to the suspect or something that they have touched in order to compare it to a crime scene sample? If so, in what circumstances do you think this would be appropriate?*

52. The rules under which DNA is indirectly collected should be subject to either statute or statutory guidance, because this would provide more certainty than the common law approach that has been taken in the jurisdictions surveyed in the Issues Paper.[31]

53. The guidance should address such matters as: the nature of the item abandoned, the context and location of abandonment, whether coercion was used, and the purpose for which the sample is sought.

54. We support the Commission's suggestion that more clarity could be achieved by establishing a statutory search power,[32] because the question involves a complex interplay of principles, policy, privacy and property issues that have not been clearly resolved by case law to date. A statutory search power should allow police officers to arrange for analysis of a discarded item, provided that certain criteria are met; in particular, we agree with the Commission that

---

29 [8.124]
30 [8.131]
31 Australia, Canada and USA, and Ireland at [9.10], [9.11] to [9.14] and [9.15 to 9.19] respectively.
32 [9.70]

the search power should be contingent on a court order,[33] because indirect searches side-step the protections built into the direct suspect sampling procedures.

Q18. *Instead of obtaining a reference sample directly from a suspect, do you think that a police officer should be able to obtain access to the suspect's newborn blood spot card in order to compare it to a crime scene sample? If so, in what circumstances do you think that would be appropriate?*

55. It is vitally important not to compromise the willingness of parents to consent to their child's inclusion in the Newborn Metabolic Screening Programme for health purposes. Any suggestion that the blood spot cards might be made available to Police for anything less than an emergency, last resort situation could severely undermine public confidence in the Programme. The use of newborn bloodspot cards for criminal investigations should be strictly circumscribed in statute, because it is significantly different from the purpose they are intended for. The presumption should be against use, unless very limited exceptions apply.

56. We agree with the principle in the Memorandum of Understanding between Police and the Ministry of Health that any use of a blood spot card for a non-health-related purpose should be regarded as exceptional. As such, police should only be able to access the DNA information in blood spot cards as a last resort.

57. We do not agree that there should be an unconditional prohibition on the use of blood spot cards to identify suspects, since there may be rare cases when the sampling from a blood spot card is the only available evidence in a case involving serious offending. However, we agree that giving the Memorandum of Understanding legislative standing would clarify the circumstances when the use of blood spot cards as forensic evidence is permissible. A judge determining an application for a search warrant within a stringent legislative framework would have the ability to question police about the justification for using a blood spot card, and whether other investigative avenues have been exhausted.

Q19. *Instead of obtaining a reference sample directly from a suspect, do you think that a police officer should be able to obtain a reference sample from one of the suspect's close relatives in order to compare it to a crime scene sample? If so, in what circumstances do you think this would be appropriate?*

58. As the Issues Paper identifies, the intrusion associated with the State obtaining a reference sample from a person who has no connection to the offence under investigation is a significant issue.[34]

59. Familial reference sampling creates risks of inaccuracy because it is acknowledged to be an imperfect technology. This outweighs the benefits it may offer as an innovative approach in the investigation of challenging or cold cases, when other traditional investigative techniques have failed to produce a suspect.

60. Evidence from other jurisdictions suggests that familial reference sampling is associated with a high rate of false positives and therefore may be of limited benefit in identifying a relative of the true offender. Whilst familial DNA profiles may be similar to a perpetrator's DNA profile, the fact that they are not identical creates a risk of fruitless leads in an investigation

---

33 ibid

34 [9.105]

and infringes the personal freedoms of anyone that they mistakenly lead to. This infringement would be exacerbated if the media became aware of the results of familial reference sampling and wrongly associated them with a particular individual.

61. As such, if familial reference sampling is permitted in the revised statutory regime, there should be clear guidelines on how and when it can take place.

62. There is a risk that familial reference sampling may become more prevalent as the costs of rapid DNA analysis reduce and as genetic databases expand. Privacy concerns, including the fact that people who voluntarily contribute their DNA to medical and genealogical databases do not expect to have their genetic codes scrutinised by Police, justify a system of oversight that would prevent the pursuit of dubious matches.

63. Further, consideration will need to be given to the types of offences considered serious enough to justify familial reference sampling if it is to be a legitimate sample source. The Law Society submits that familial DNA should not be available for minor offences and should only be available where a match conforms to rigorous reliability criteria.

64. For these reasons we suggest that familial reference sampling should be permitted as a last resort, subject to a judicial warrant being obtained, and only in respect of the most serious categories of offences. We agree that the process should be subject to an oversight body that would apply strict reliability criteria, in addition to considering relevant Treaty, NZBORA and privacy issues.

Q20: *Do you have any concerns about Police using information that is publicly available on genealogical websites as an investigative tool to help identify potential suspects in criminal investigations?*

65. Police currently have a wide discretion over where they search for evidence. In particular, there is no prohibition on Police searches of publicly available genealogical websites and databases. Such databases may contain genetic material from thousands of people without criminal records, who would not have expected when they provided their samples, that their DNA may subsequently be used without their consent to investigate distant family members.

66. In some jurisdictions there is an active debate about whether it should be lawful for police to search DNA genealogy databases without a warrant. While there may be some broad support in other jurisdictions for police to have such a power, that support is highest for investigations into violent crimes and crimes against children. We therefore agree that searches of this type should be lawful, but they should be subject to statutory rules addressing which types of agencies can lawfully use this category of DNA, for what purposes and in what circumstances. As with samples from blood spot cards and familial searches, permission to obtain DNA via this method should be subject to a judicial warrant.

67. An important practical consideration is whether the chain of custody processes used by genealogy databases are adequate to provide assurances about the reliability of any evidence derived from those searches.

68. If this search method is permitted in New Zealand, the public should also be put on notice that DNA they submit to a genealogical website may be accessed by police in specified circumstances. It would be reasonable for any oversight body to take responsibility for this area of public information and education.

CHAPTER 10 – CRIME SAMPLE DATABANK

Q21. *Do you think that the Crime Sample Databank (CSD) should be expressly referred to in legislation? If so, what level of detail do you think would be appropriate?*

69. Yes. If the purpose of the CSD is to hold profiles generated from crime scene samples with the goal of matching these to known individuals, it is important that the information in the CSD is protected with appropriate privacy safeguards, by legislation. The workability and effectiveness of these safeguards will be improved if the CSD is expressly referred to in legislation and there is therefore transparency around how it should be used.

Q22. *Do you have any particular concerns about victim and third-party profiles being uploaded to the CSD? If so, how do you think those concerns would best be addressed?*

70. It will be necessary to upload victim and third-party profiles to the CSD in a number of circumstances. For example, they may be relevant for elimination purposes, and third-party samples may be relevant if a suspect's defence seeks to implicate a third party. However, it should not be a default approach, and a decision to upload victim and third-party profiles should be made on a case by case basis by the Police officer in charge, subject to guidelines.

71. If victim and third-party profiles are collected, they should be stored in a uniform manner. Storing them locally in an ad hoc manner, for example on CD, USB or a local computer file, is likely to result in inconsistent treatment of such profiles and would make it difficult to ensure appropriate oversight. It would raise questions around security, access rights and encryption, and would increase the risk of loss. It is therefore preferable for victim and third-party profiles to be handled consistently. Uploading the profiles to the CSD would achieve this purpose. As outlined above at paragraph [48], victim and third-party profiles are likely to be better protected by retaining them on a separate index of the CSD from suspects' profiles.

72. However, it is a concern that if victims' and third-parties' profiles are retained on the CSD for any longer than the duration of the case, the likelihood increases that they may subsequently be used for a purpose other than that for which they were originally obtained. This would engage the privacy rights of those victims and third parties, but unlike with the retention of suspects' and offenders' profiles, that engagement would not be justified or proportionate to the need to prevent and detect crime.

73. In practice, the safeguards in the Privacy Act (Information Privacy Principle 9[35] and Information Privacy Principle 10)[36] may not be sufficient to ensure that these samples are uploaded to the CSD only when necessary for the purpose of the case, retained only for as long as there is a lawful purpose, and used for the purpose for which they were collected.

74. We agree with the Law Commission proposal that additional legislative and policy safeguards are necessary. In particular:

    a. clarity is needed about the purpose of the CSD;

---

35 Privacy Act 1993, section 6, Information Privacy Principle 9: Agency not to keep personal information for longer than necessary.

36 Privacy Act 1993, section 6, Information Privacy Principle 10: Limits on use of personal information.

b. clarity is needed about when and for what purpose profiles may or may not be uploaded, depending on whether it is a suspect, victim or third-party profile, and what the profile may be used for;

c. there should be clear trigger events or timescales for the review of the retention or deletion of profiles; and

d. there should be clear obligations on the administrator of the CSD to remove profiles once they are no longer needed in respect of the case in which they were seized.

75. There would need to be distinct rules for review, retention and deletion of different categories of profiles. Suspects' profiles should be retained for longer than victim and third-party profiles, which should only be retained for the purpose of the case.

76. Guidelines should also specify who has the obligation to remove the profile, and what should be done with it.

77. We consider that guidelines on the use of victim and third-party profiles, and review, retention and deletion would be most flexible if promulgated by an oversight body rather than through legislation. The Law Society agrees with the oversight responsibilities proposed at [10.71] of the Issues Paper.

Q23. *Do you have any concerns about low-quality crime scene profiles being uploaded onto the CSD? If so, how do you think those concerns would best be addressed?*

78. We agree that use of low-quality crime scene profiles may be inconsistent with IPP8.[37] However, it may not be helpful in this context to stipulate that profiles must be complete before they can be considered to be of sufficiently high quality, because we understand that obtaining a 100% complete profile is unlikely to be possible in all cases.

79. Guidance is therefore necessary to determine what constitutes an adequate quality of sample for upload to the CSD. The terminology used to determine the adequacy of a profile for the purposes of a criminal investigation is likely to evolve as scientific techniques develop, so it would be sensible to allow scope for such developments. As such, it may be more appropriate for an oversight body to be responsible for determining and describing the appropriate level of quality, rather than it being stipulated in legislation.

Q24. *What type of offending do you think we should aim to resolve using the CSD? Put another way, do you think that DNA profiles associated with any level of offending should be able to be uploaded onto the CSD, or should there be a seriousness threshold? If so, what level of seriousness do you think would be appropriate?*

80. The type of offending the CSD should be used for is contingent on principles of proportionality. If profiles are of adequate quality, do not contain information that is irrelevant or disproportionate to the purpose of investigation, are used only for the purposes for which they were obtained, and are subject to an appropriate retention and deletion regime, then the Law Society considers that concerns about use of the CSD for the investigation of low-level offending might diminish. An appropriate starting point would be that the CSD should only be used for the investigation of offences that carry a sentence of imprisonment where the maximum term is at least two years.

---

[37] Privacy Act 1993, section 6, Information Privacy Principle: *Accuracy, etc, of personal information to be checked before use*

Q25. *Do you think that additional steps should be taken to measure how effective New Zealand's DNA profile databanks are in helping to resolve criminal investigations? If so, what do you think those steps should be?*

81. It is necessary to implement steps to measure the effectiveness of New Zealand's DNA Profile Databank because the efficacy of the tool is linked to the proportionality of its use. Measurement will therefore enable future decision-making about limitations to be properly informed and therefore fairer and more proportionate.

82. It would be appropriate to monitor the number and type of offences where DNA is:

    a. searched for;

    b. collected;

    c. used by investigators to confirm the identity of a known suspect;

    d. used by investigators to identify a previously unknown suspect;

    e. relied on or challenged by either the prosecution or defence at trial;

    f. relied on or challenged in appeal proceedings, including cases before a Criminal Cases Review Commission, if established.

83. The type of DNA technique used, and the manner of use, e.g. familial or genealogical database searching, should also be monitored in respect of each of the above criteria.

CHAPTER 11 – KNOWN PERSON DATABANK – COLLECTION

Q26. *Generally speaking, the threshold for obtaining DNA profiles for the known person databank is that the triggering offence must be imprisonable. What offence threshold do you think is appropriate, and how do you think it should be framed? For example, should the threshold be framed as a list of triggering offences, should it be based on the maximum penalty for the triggering offence, should it be based on whether the person serves a prison sentence or should it be framed a different way?*

84. We agree that the threshold for obtaining DNA profiles for the known person database should be that the triggering offence carries a sentence of imprisonment. As with the threshold for use of the CSD, the appropriate threshold is that the maximum penalty is a term of imprisonment of at least two years. This is also consistent with offences for which trial by jury is available. This strikes an appropriate balance between the privacy intrusion inherent in retaining an individual's DNA after their conviction, and the need to provide investigators with resources to prevent and detect serious crime.

85. A threshold based on a maximum penalty is also transparent, easy to understand and clear, whereas a threshold based on the actual sentence imposed would be less predictable and less consistent because there are a wide range of reasons why particular sentences are imposed, that are not linked to the purposes of the DNA regime.

Q27. *Do you think that it is appropriate to obtain biological samples from convicted offenders for the purpose of the known person databank? If so, how do you think these samples should be collected? For instance, should they continue to be obtained by databank compulsion notice, and if so, what time limit should apply? Alternatively, do you think it would be appropriate to obtain a databank sample at the time a person is arrested and then effectively quarantine it until the relevant court proceedings have concluded?*

86. It is appropriate to obtain biological samples from convicted offenders for the known person databank, and the most appropriate time to collect these samples is upon conviction, at the courthouse. The court currently has power to detain for up to two hours for an offender to sign a bail bond or be served with papers relating to sentence or a protection order etc. This power could be used to obtain a sample.

87. The current process provides that Police are responsible for collecting samples, however, this could be extended to encompass court security staff. The ease with which a buccal sample can now be taken means that the administration of court would not be delayed by the process of a sample being taken at the courthouse upon the conviction being entered.

88. A high percentage of offenders who are convicted for imprisonable offences are represented by lawyers, whereas most defendants are unrepresented at the time of arrest and some may be under the effects of alcohol and other drugs. Offenders are therefore more likely to gain a better understanding of their rights in relation to the sample if it is taken at court, upon conviction.

89. Additionally, there are a number of compulsory steps that must be taken upon arrest that are not dependent upon conviction, such as photographing and fingerprinting. This is already a very stressful process, and the stress is likely to be increased by adding another invasive measure. Taking a sample at this time, when it does not yet qualify for entry to the databank, may also give the suspect the wrong impression that sampling is conditional upon arrest, not conviction. It also seems more administratively complicated for DNA samples to be taken from arrestees, but to only add the profiles to the known persons databank in the event of conviction.

Q28. *Do you think that it is appropriate to obtain biological samples from suspects for the purpose of the known person databank? If so, how do you think these samples should be collected? For instance, if a person provides a suspect sample in relation to an investigation, should the resulting DNA profile also be uploaded onto the known person databank (prior to any court proceedings concluding)? Alternatively, should the court be empowered to order that a charged person must provide a databank sample (which can then be compared to the Crime Sample Databank) before the court proceedings against them have concluded? If so, what factors should the court take into account?*

90. Sampling of suspects should be under a different regime to sampling convicted offenders, with a higher level of judicial oversight.

91. If a suspect sample is collected by reference to a specific investigation, the profile derived from it should only be added to the known persons databank if a conviction for a triggering offence is received. While there is justification for sampling convicted offenders, sampling at a stage when suspects are presumed innocent is more akin to a carrying out a search for evidence. A procedure that is similar to a search warrant is therefore more appropriate. In determining whether to approve a warrant to obtain a suspect sample, the court should consider whether there is already a crime scene sample for comparison and then whether there are reasonable grounds to suspect that sampling the suspect may result in a match.

Q29. *Do you think that it is appropriate to obtain biological samples from people for the purpose of the known person databank if they are not convicted offenders or suspects? If so, who should these samples be collected from and how should they be collected? For instance, do you think there should be a universal databank, and if so, how would that work in practice? Do you think police officers should be able to obtain databank samples by consent, and if so, who should they ask?*

92. The known person databank should be limited to profiles of convicted offenders. This is subject to the suggestion that separate indices would be appropriate to store investigators' and victims' and third-parties' elimination profiles.

93. A universal databank would be a disproportionate infringement on human rights contrary to section 21 of the New Zealand Bill of Rights Act (the right to be secure against unreasonable search and seizure), particularly in light of the small number of cases in which DNA evidence is currently used during criminal investigations and prosecutions. We note the estimate in the Issues Paper that crime scene samples are collected in only 0.5% to 2% of investigations.[38] We cannot see that any law enforcement benefit gained from a mass databank would be commensurate with the scale of human rights intrusion, and we further note the lack of evidence that a universal databank would have any meaningful deterrent effect on criminal offending.[39] It is also significant that no other foreign jurisdiction operates a universal DNA databank.

CHAPTER 12 – KNOWN PERSON DATABANK – USE

Q30. *What limits do you think should be placed around New Zealand Police comparing an overseas crime scene profile to the known person databank on behalf of a foreign law enforcement agency?*

94. We agree with the Commission's proposal that the New Zealand DNA Profile Databank should be available to foreign law enforcement agencies, subject to strict compliance with the Mutual Assistance in Criminal Matters Act 1992, i.e. authorised on a case by case basis by the Attorney-General.

95. In response to the specific concern raised about overseas requests for familial searching,[40] we suggest that at a minimum:

    a. this technique is only made available to foreign law enforcement agencies whose own jurisdictions permit its use; and

    b. any such requests are subject to an approval process that is no less onerous than the regime for New Zealand's domestic use of this technique. We acknowledge that in practice the information provided to supplement overseas requests may often be insufficient to reach the threshold for authorisation.

---

38 [11.183]

39 [11.183] at footnote 178.

40 [12.20] to [12.21]

Q31. *Should the DNA profiles on the known person databank ever be made available for research in an "anonymised" form? If so, in what circumstances and how do you think that the request/approval process should be managed?*

96. We note that while Police operate what appears to be a stringent policy[41] before approving access to Police information for external researchers, that policy does not apply to Police or ESR researchers, and it is uncertain whether it applies to agencies working in collaboration with Police.

97. We consider that the informational significance inherent in DNA justifies a stringent research approval policy that is at least as robust as the Police external research policy, centred around anonymisation, irrespective of the identity, status or source of funding of the researcher.

98. Further, we acknowledge that the high representation of Māori DNA on the known person databank means that it is important for any research conducted in relation to the known person databank to be subject to ethics oversight functions that incorporate Māori research ethics.

CHAPTER 13 – FAMILIAL SEARCHING

Q32. *What concerns do you have, if any, about the use of familial searching in criminal investigations?*

99. We have a number of concerns about familial searching in criminal investigations, and we agree with the comprehensive outline in the Issues Paper, including:

a. the potentially discriminatory effect of familial searching and breach of section 19 of NZBORA (freedom from discrimination);[42]

b. potential conflict with section 21 of NZBORA (the right to be secure against unreasonable search and seizure), particularly in the absence of information being provided to those providing samples and informed consent being obtained (if samples are obtained by consent);[43]

c. potential inconsistency with the Treaty of Waitangi and tikanga;[44] and

d. privacy concerns.[45]

Q33: *How do you think familial searching should be regulated in New Zealand?*

100. We consider that legislative reform is appropriate to regulate the use of familial searching in criminal investigations, and we prefer the option of developing a conservative statutory regime that permits familial searching in a limited class of cases involving the investigation of very serious crimes, which should be defined, where other investigative techniques have been exhausted. The statutory regime should require Police to inform those providing voluntary samples of the potential for familial searching.

---

41 Issues Paper [12.23] and New Zealand Police *Police policy for external researchers' access to resources, data or privileged information* (August 2018).

42 [13.11] to [13.42]

43 [13.43] to [13.44]

44 [13.45] to [13.46]

45 [13.48] to [13.54].

101. Given the serious potential discriminatory effects of familial searching, and the significant privacy concerns that arise, we consider a warrant mechanism (application to a judge for a specific familial search order) is preferable.

102. We also consider that the creation of an independent oversight body to monitor the use of familial searching is appropriate.

CHAPTER 14 – RETENTION OF SAMPLES AND PROFILES

Q34. *Do you think that a person should be able to choose to have their biological sample returned to them (as opposed to it being destroyed)?*

103. We consider that the legislation should allow a person to be able to choose to have their biological sample returned to them once there is no continuing need to retain it. The response to question 38 considers how long that period might be. Requests to return samples are unlikely to arise in the majority of cases, or be necessary for all types of samples, depending on the requirements of tikanga and other cultural norms, but it is preferable to allow for that choice if possible.

104. Useful parallels may be drawn with the process for new-born blood spot cards. Parents, or the children themselves once they reach the appropriate age, have the right to ask for the return of their card using a specific request process. Similarly, hospitals and other health agencies have developed processes to allow people to have their body tissue returned to them upon request.

105. A considerable amount of information is given to people when a DNA sample is collected, so asking them to decide at that time whether they will eventually want the sample back would add unnecessary complexity. In addition, it may be some time before return of a sample is appropriate and by that time it may not be practicable to act on instructions given at the time of collection (for example, the person may have moved address or be otherwise unlocatable).

106. Instead, as with the new-born blood spot cards[46] and other health sector processes:

a. some very brief information could be provided at the time of sample collection, to the effect that most samples will be destroyed after a specified time, but that people can ask for their return before that if they wish; and

b. further information could then be available on an appropriate website, perhaps hosted by a regulatory body, setting out details of retention periods and standard forms to request return of samples.

107. In line with the normal privacy principles, appropriate steps would need to be taken to ensure that returned samples are secure and that they are sent to the correct person.

Q35. *What procedures do you think should surround the destruction of biological samples? Should people have a choice as to how it is done? Should people be notified when it has occurred?*

108. It is preferable for destruction procedures to be standardised to make it more likely that destruction will occur correctly and at the appropriate time. Minimising the complexity of the process will also minimise the risk of errors and omissions. An oversight body should

---

46 https://www.nsu.govt.nz/pregnancy-newborn-screening/newborn-metabolic-screening-programme-heel-prick-test/frequently-asked.

determine what destruction procedures are appropriate, subject to observing the requirements of tikanga, and could verify that those procedures are followed as part of its audit and monitoring role.

109. The high number of samples collected means that notification of destruction is likely to be disproportionately difficult and resource-intensive. Notification should also be unnecessary if the destruction process is properly standardised, and there are appropriate checks in place to ensure that the process is correctly followed. In addition, there is a risk that a destruction notification could be sent to the wrong person, resulting in a breach of privacy, if Police and ESR do not have up to date contact details.

110. If our view on question 34 is accepted, people who wish their sample to be destroyed in a particular way can ask for it to be returned to them and can then make their own arrangements for destruction.

Q36. *Should an oversight body audit compliance with the rules around retention and destruction of biological samples and tikanga, ensure secure storage of samples and consider compliance consistency with tikanga?*

111. We consider that these are entirely appropriate roles for the oversight body. Retention of samples beyond their legislative use-by date can significantly increase the risks that samples are used for collateral and inappropriate purposes.

112. It would be appropriate for the exact shape of that audit or monitoring and verification process to be determined by the oversight body. However, it would be useful for the legislation to specify that Police and ESR must co-operate with any reasonable requests by the oversight body, including if necessary, permitting access to systems, premises and people in order to conduct the oversight and verification role. An oversight power to directly audit is more likely than a Police/ESR self-reporting regime to garner the necessary public confidence that processes are being correctly followed.

Q37. *Should suspect and elimination samples that are obtained from known persons in relation to specific cases be retained after a DNA profile is generated? If so, why, and for how long?*

113. As a general rule, known person, suspect and elimination samples should be disposed of as soon as practicable after a DNA profile is obtained. In the rare cases where there may be a case-specific reason why a sample should be retained, we consider that the Police should be required to make an application to an oversight body or judge for retention for a further specified period, failing which the sample must be deleted.

Q38. *Should crime scene samples be retained after the associated criminal investigation is closed? If so, do you think they should be retained in all cases or only in cases over a certain threshold of seriousness? How long should they be retained?*

114. We acknowledge the tension between the general rule that evidential material should be returned to its owner or otherwise disposed of once it is not required for investigative or evidential purposes and the potentially significant role that subsequent DNA analysis may have, and has had, in exonerating convicted persons, even many years after the event. We suggest that the scope for potential exoneration is sufficiently important to justify long-term retention of DNA samples in serious cases. The simplest and most transparent approach would be to link the retention period to the seriousness of the offence as reflected by the maximum penalty available for the offence, for example, a crime scene sample relating to an

offence punishable by life imprisonment might be retained indefinitely, while lesser periods may be appropriate for less serious offences.

Q39. *How should a convicted person's request for reanalysis of a crime scene sample be managed? Should the procedure be set out in legislation?*

115. It would be appropriate for requests for reanalysis of crime scene samples to be considered by a party that is independent of the Police. There is also merit in empowering the proposed Criminal Cases Review Commission to require reanalysis where a convicted person's case is being reviewed by the Commission. However, we consider that a residual mechanism should remain available by which a convicted person may request a reanalysis of a crime scene sample by an independent party, even in cases where that person's conviction is not being reviewed by the proposed Criminal Cases Review Commission, and that such a mechanism should be set out in legislation.

Q40. *Do you have any concerns around DNA profiles being retained on the known person databank indefinitely?*

116. It is important not to undermine the purpose for which the known person databank has been created, by requiring samples to be destroyed when there is a genuine and proportionate purpose to retain them. However, we think that more restrictive databanks are strongly preferable both from a constitutional and human rights perspective. Indefinite retention of information should therefore only be permitted in restricted circumstances, for example for particularly serious offending.

Q41. *Do you think the DNA profile retention periods that currently apply to the known person databank should be simplified?*

117. It is desirable to simplify the retention periods as much as possible, so that people can better understand their rights. We note, however, that a desire for simplicity should not result in DNA profiles being kept for longer than is proportionate and necessary.

Q42. *Do you think that the DNA profile retention periods that apply to the known person databank should be changed to place a greater emphasis on rehabilitation?*

118. We agree with the comments in the Issues Paper[47] that rehabilitation should be one of the factors that should be considered when deciding on an appropriate retention period. This is particularly important for young people, but it also applies to adult offenders. While we accept that the policy behind the Criminal Records (Clean Slate) Act 2004 is somewhat different from the policy applying to the known person databank, there is a common underlying principle that people should not be criminalised forever.

119. If an appropriate period has passed without any evidence of reoffending, removal of a person's sample from the known person databank is a useful signal that the person is now considered to be less at risk of reoffending. The appropriate period may differ depending on whether the person was a child, a young person or an adult at the time of the offence for which the sample was collected.

---

47 [14.112].

Q43. *Do you think that steps should be taken to ensure that a person's DNA profile is not retained for a lengthy period of time on the known person databank following their death? If so, what measures do you think should be put in place?*

120. It is hard to justify retention of a person's DNA profile for a lengthy period once they have died, since there is no longer any chance of reoffending. The only reason would be the potential for that information to be used for the purposes of solving cold cases.

121. There would need to be an accurate and practicable mechanism for Police to verify that the person has died. The proposal for Police to receive information about deaths from the Department of Internal Affairs may help to resolve this issue in most situations. We note that it may not be possible in all cases to accurately link the name of a person in the deaths register to the name associated with a sample on the known person databank: if an exact match between names cannot be made then it would not be appropriate for the sample to be destroyed.

Q44. *Should crime scene profiles be retained on the Crime Sample Databank indefinitely? If not, what legislation and/or policies do you think would ensure that the profiles are removed at an appropriate time?*

122. Crime scene profiles should not be retained on the Crime Sample Databank indefinitely, for the reasons identified in the Issues Paper at [14.116] and [14.118]. We also agree that there are compelling reasons to require the development of an effective system for the removal of crime scene profiles which should no longer be retained on the Crime Sample Databank. We consider that legislation should require the removal of crime scene profiles once the person responsible for the profile is identified and, if that person is a suspect, once the investigation has concluded in a conviction.[48]

123. We have considered the option of legislating against the use of crime scene profiles that should have been removed from the crime scene databank. However, that may be difficult to regulate in practice, and may be unnecessarily restrictive. It is therefore preferable for the courts to determine the admissibility of any evidence obtained by Police through use of a crime scene sample that should have been removed from the Crime Sample Databank. This would be consistent with the approach to other forms of improperly obtained evidence under the Evidence Act 2006.

Q45. *Should an independent oversight body oversee the retention, security and destruction (as appropriate) of DNA profiles (whether held on case files, indices or databanks)?*

124. We consider that this is an appropriate role for an independent oversight body. Any oversight function involving the monitoring of sample destruction would be undermined without an equivalent monitoring role for retention and secure deletion of DNA profiles derived from those samples, wherever that information happens to be held, by whichever agency, and whatever the format of that information may be.

---

48 [14.119].

CHAPTER 15 – OVERSIGHT

Q46. *Do you think there needs to be increased independent oversight of the use of DNA in criminal investigations?*

125. Yes. As the Issues Paper sets out, there is a need for independently set and audited controls and for ongoing monitoring of procedural compliance, fairness, proportionality and efficacy.

Q47. *If so, what oversight functions and powers do you see as being the most important?*

126. The two key functions for an oversight body are standard-setting, which must entail some mechanism for wide community consultation, and auditing/monitoring/reporting. The standard-setting function could usefully be modelled on, for example, the code of practice mechanism of the Privacy Act 1993. As outlined above at [68], the provision of public information about DNA techniques would also appropriately sit with an oversight body.

127. Developments in DNA technology are likely to be contentious in their scope for application, and without monitoring, may inadvertently result in State or Police powers being significantly extended. As such, it is important for the purposes of State accountability, that the implementation of new DNA techniques in criminal investigations is subject to legislative amendment or subordinate legislation, with scrutiny provided by the Regulations Review Committee where appropriate. It would also be sensible for an oversight body to be involved where new techniques are adopted.

128. Case-specific functions, such as those outlined at page 325 of the Issues Paper, are most appropriately dealt with by a judicial warrant system.

129. Complaints processes are already adequately provided by existing mechanisms, whether through the Independent Police Conduct Authority (IPCA) or the courts. A Bill that would introduce a separate mechanism for criminal case reviews was introduced in September 2018 and is currently at select committee stage.[49]

Q48. *What form of oversight body do you think might be appropriate?*

130. We support the introduction of a small independent multi-disciplinary panel as the most appropriate form of oversight body. This is justified in light of the scale of data collection and access, the involvement of significant public issues and a small number of critical stakeholders, together with the highly technical nature of some of the proposed functions. This suggestion is subject to the view that case-specific functions should be discharged by a judicial officer, as outlined above at [128].

131. A multi-disciplinary panel would allow for tikanga, technical and/or ethical expertise alongside expertise in legal issues and compliance monitoring. We agree that any oversight regime needs to ensure that Māori interests are central to governance and decision-making about the use of DNA in criminal investigations and that care needs to be taken to ensure such interests are properly recognised.

---

49 https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_80426/criminal-cases-review-commission-bill.

132. We acknowledge the State Services Commission and Legislation Design and Advisory Committee's guidelines,[50] and agree in particular that it is usually more effective to allocate new functions and powers to an existing body than it is to create a new one.

133. However, while the IPCA and the Privacy Commissioner are better suited to this role than the other agencies discussed in the Issues Paper, we consider that none of the existing New Zealand bodies discussed at [15.60] to [15.94] has all of the necessary skills and qualities to achieve effective oversight on their own.

134. We also see merit in the establishment of a new Commissioner who could lead the independent panel. Similar developments in Scotland seem particularly worthy of further consideration. The idea of a Biometrics Commissioner in New Zealand with jurisdiction to oversee the use of DNA (and potentially other biometric information) by Police and other government (and non-government) agencies, is an idea worth exploring. As in other jurisdictions, the ideal appointee is likely to be a judge or retired judge.

135. A Biometrics Commissioner could potentially be located within the Office of the Privacy Commissioner or IPCA. This would avoid the cost of setting up a completely new body. Both the Privacy Commissioner and Biometrics Commissioner would be members of the independent panel, and the other independent members should have significant expertise in criminal investigations and court procedures, DNA science, tikanga and ethics. Alternatively, matters of ethics could be considered by a separate ethics advisory group.

CONCLUSION

136. We hope this submission is helpful to the Commission in its review of the Act. Please do not hesitate to get in touch if further discussion would assist. We would appreciate the opportunity to be involved in any further development of the law in relation to the use of DNA in criminal investigations, such as reviewing draft legislation or terms of reference for oversight functions.

Yours faithfully,

Tiana Epati
President-elect

Appendix A: Suggested areas of independent oversight

---

50 http://www.ldac.org.nz/assets/Uploads/4016e0adf9/Legislation-Guidelines-2018-edition.pdf at [20.1], p94.

Appendix A

Suggested areas of independent oversight

Independent Oversight Functions:	
Q.6, para 14	Market approval of new DNA phenotyping kits.
Q.8, para 16, Q10, para 21	Approval of new DNA techniques in the evidential process.
Q.9, para 20	Should include representative from ESR
Q.19, para 64	Setting guidelines / criteria governing applications for familial reference samples.
Q.20, para 68	Providing public information and education.
Q.22, para 77	Setting guidelines on use of victim and third-party profiles.
Q.23, para 79	Determine the level at which a sample is of adequate quality.
Q.31, para 98	Oversight of research ethics considerations.
Q.33, para 102	Monitor use of familial searching.
Q.35, para 108	Determine appropriate sample destruction procedures.
Q36, para 111-112	Audit compliance re: retention and destruction of samples, tikanga, and storage / security / access
Q.37, para 113	Approval for retention of samples after a profile has been created.
Q.45, para 124	Audit deletion of Crime Scene Profiles from the Crime Sample Databank
Q.46, para 125 Q.47, para 126	General summary of oversight powers: standard setting, auditing, monitoring compliance, reporting.
Judicial Functions / Warrant approvals	
Q13, para 32 Q14, para 40	Approval of applications for compulsion orders, and from child / youth suspects.
Q.18, para 57	Approval of warrant application for reliance on blood-spot cards.
Q.19, para 64	Approval of warrant application for obtaining familial reference samples.

Q.20, para 66	Approval of warrant application for law enforcement agencies to search DNA genealogy databases.
Q.28, para 91	Approval of warrant application to obtain a suspect's sample
Q.33, para 101	Approval of warrant for familial searching of the known person databank.
Q.37, para 113	Approval for retention of samples after a profile has been created.